

3-31-2021

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Recommended Citation

Jenn Michelle Pedini & Cassidy Crockett-Verba, *Decriminalization in Virginia: Marijuana in the 2020 General Assembly Session*, 24 RICH. PUB. INT. L. REV. 65 (2021).

Available at: <https://scholarship.richmond.edu/pilr/vol24/iss1/5>

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DECRIMINALIZATION IN VIRGINIA: MARIJUANA IN THE 2020 GENERAL ASSEMBLY SESSION

*Jenn Michelle Pedini & Cassidy Crockett-Verba**

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ABSTRACT

Cannabis is regulated in over one-third of the United States and it has finally made its way to Virginia. While it is not yet legal in the Commonwealth, it has been decriminalized. This is when the criminal penalties are removed but civil penalties (often fines) remain. This is a step in the right direction but activists know that this is not enough for the communities that continue to be harmed by a failed war on drugs. The legislation in Virginia will not fix the issue of over-policing in Black and Brown communities but activists believe that it will put Virginia in a position to repair past harms. The legislation itself imposes a \$25 fine each time a person is caught with one ounce or less of marijuana. There are no escalating penalties. Activist groups were divided on the legislation's ability to actually fix any harms within the communities most harmed by prohibition. The bills failed to address the issue of decriminalizing paraphernalia or third-party background checks in record sealing. However, it also includes provisions for a work group to study the possible legalization of adult-use in 2021. Many activists believe that this legislation is a steppingstone that will be used to help Virginia ease into the world of legalized marijuana. While there is a long way to go, Virginia is taking its first steps towards modernity and taking the first steps towards fixing its past.

INTRODUCTION

Although it remains federally illegal, cannabis is regulated for adult and/or medical use in over three dozen states and territories in the United States.¹ Laws vary widely between jurisdictions with some requiring a physician recommendation, some allowing possession and commercial sales to adults 21 and older, and others only removing criminal penalties.² Even within these defined programs, each state has different allowances. For instance, New York's medical cannabis program prohibits whole-plant and edible products, as well as smoking, while Colorado's is more lenient, allowing the same products that are permitted in the adult-use framework.³ This patchwork does not create a comprehensive network of laws that one could follow while

¹ *State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 10, 2020), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

² *Id.*

³ *Frequently Asked Questions*, N.Y. DEP'T OF HEALTH, https://www.health.ny.gov/regulations/medical_marijuana/faq.htm (last visited Sept. 28, 2020) (describing the forms and dosage amounts of medical marijuana allowed in New York); see *Colorado Marijuana FAQs*, POTGUIDE, <https://potguide.com/colorado/marijuana-faqs/> (last visited Sept. 28, 2020) (describing the types of marijuana available in Colorado).

traveling across the country, but it does provide legal protections for many residents.

As activists push for reform in social and criminal justice, there is a growing focus on cannabis law.⁴ It has been shown that Black and Brown Americans are 3.6 times more likely to be arrested than white Americans, despite similar rates of consumption.⁵ This racial disparity in arrests has been a large driving force behind many efforts to legalize marijuana as well as introducing many social equity reforms to existing regulatory models.⁶ In Virginia, recent attempts to legalize cannabis have not garnered enough votes to advance from legislative subcommittees.⁷ However, due to work by advocates from many organizations using a variety of tactics, the 2020 Virginia General Assembly was able to pass a decriminalization measure that is likely to decrease arrests by about fifty percent.⁸ This is not a law that is intended as an end goal, but rather a steppingstone to decrease arrests while the state explores how to effectively and equitably legalize cannabis.

I. Decriminalization

When decriminalization measures pass, people often ask what exactly “decriminalization” means. Generally speaking, decriminalization is “to remove or reduce the criminal classification or status” of something.⁹ In the context of cannabis, it often means the removal or reduction of jail time, or the substitution of a criminal charge with a civil penalty.¹⁰ This is often mistaken for depenalization, or the removal of all penalties, including civil fines. While the two systems are similar, depenalization is also only a steppingstone to legalization, as it does not provide for regulated commercial sales.¹¹

⁴ See Tom Angell, *On 4/20, ACLU Highlights Racist Marijuana Enforcement In New Report*, FORBES (Apr. 20, 2020), <https://www.forbes.com/sites/tomangell/2020/04/20/on-420-aclu-highlights-racist-marijuana-enforcement-in-new-report/>.

⁵ *Id.*

⁶ See *id.*

⁷ See *Marijuana-related legislation in the 2020 Virginia General Assembly*, VA. NORML, https://www.vanorml.org/2020_legislation (last visited Oct. 10, 2020).

⁸ See *Virginia: Governor Approves Bill to Decriminalize Marijuana and Legalize Medical Cannabis*, NORML, (Apr. 12, 2020), <https://norml.org/blog/2020/04/12/virginia-governor-approves-bills-to-decriminalize-marijuana-and-legalize-medical-cannabis/> (noting Virginia Governor’s approval of decriminalization of marijuana possession); see also Monique Calello, *Fines, not crimes: Marijuana gets ‘high’ sign From Virginia Senate*, NEWS LEADER (Mar. 10, 2020), <https://www.news-leader.com/story/news/2020/03/10/fines-not-crimes-marijuana-gets-high-sign-virginia-senate-marijuana-laws/4881080002/>.

⁹ *Decriminalization*, MERRIAM-WEBSTER DICTIONARY (2020).

¹⁰ See *Virginia Laws and Penalties*, NORML, <https://norml.org/laws/virginia-penalties-2/> (last visited Oct. 1, 2020).

¹¹ See John Bronsteen, *Would “Hamsterdam” Work? Drug Depenalization in the Wire and in Real Life*, 2018 U. CHI. LEGAL F. 43, 49–50, 54 (2019).

Decriminalization is often perceived as a half-measure on the path toward legalization and is quite different from what legalization proponents aim to achieve via the implementation of an adult-use regulatory model. Legalization would remove penalties for possession and use by adults, as well as create a commercial market in which consumers can purchase safe, regulated products.¹² This is exactly what consumers are experiencing in states like California, Oregon, and Colorado, which have state-licensed dispensaries at which one can purchase cannabis products that are required to meet strict consumer safety standards.¹³ Decriminalization accomplishes neither of those objectives. Rather, it simply changes the penalty for possession of marijuana from a criminal offense, which typically carries a large fine as well as jail time, to a civil offense.¹⁴

Here in Virginia, there were two companion bills that brought about decriminalization. Senate bill 2 was sponsored by Senator Adam Ebbin of Alexandria, while House bill 972 was sponsored by Delegate Charniele Herring, also of Alexandria.¹⁵ As enacted, these bills decriminalize possession of up to one ounce of marijuana and create a rebuttable presumption that possession of up to one ounce is for personal use.¹⁶ This would mean that if a person is found with any amount up to ounce, the presumption is that they are not possessing marijuana with the intent to distribute or sell to others.¹⁷ Under prior law, the penalty for a first offense misdemeanor possession was up to a \$500 fine and a maximum of 30 days in jail.¹⁸ Subsequent offenses were classified as class 1 misdemeanors, which carried a fine of up to \$2,500 and a maximum jail time of up to one year.¹⁹ The decriminalization legislation also redefines “marijuana” in the state Code to include substances

¹² Dragan M. Svrakic, et al., *Legalization, Decriminalization & Medical Use of Cannabis: A Scientific and Public Health Perspective*, 109 J. MO. ST. MED. ASS'N 90, 90 (2012) (“Legalization of cannabis is the process of removing all legal prohibitions against it. Cannabis would then be available to the adult general population for purchase and use at will, similar to tobacco and alcohol.”); see, e.g., *Regulating Commercially Legalized Marijuana as a Public Health Priority*, AM. PUB. HEALTH ASS'N (Nov. 18, 2014), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2015/01/23/10/17/regulating-commercially-legalized-marijuana-as-a-public-health-priority> (“After voters in Colorado and Washington elected to legalize marijuana, these states began to establish regulatory schemes for its cultivation, distribution, and retail sale to those 21 years of age and older. Under these and other regulatory proposals, marijuana would be regulated in a manner similar to alcohol, with age limits, licensing controls, and other regulatory and public health mechanisms.”).

¹³ *Marijuana Legal States: States Where Weed Is Legal*, WEEDMAPS, <https://weedmaps.com/learn/laws-and-regulations/> (last visited Oct. 10, 2020).

¹⁴ Katharine Neil Harris & William Martin, *The Case for Marijuana Decriminalization*, RICE UNIV. BAKER INST. FOR PUB. POL'Y. (Apr. 16, 2019), <https://www.bakerinstitute.org/media/files/files/b4b661ec/bi-report-041619-drug-mjdecrim.pdf>.

¹⁵ S. 2, 2020 Gen. Assemb., Reg. Sess. (Va. 2020); H.D. 972, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

¹⁶ Va. S. 2; Va. H.D. 972.

¹⁷ Va. S. 2; Va. H.D. 972.

¹⁸ S. 1719, 2019 Gen. Assemb., Reg. Sess. (Va. 2019) (amending VA. CODE ANN. § 18.2-250.1).

¹⁹ Va. S. 1719; VA. CODE ANN. § 18.2-11 (2020).

previously defined as “hashish oil,” such as edibles, concentrates, and vape oils.²⁰ Previously, possession of any amount of hashish oil was a class 5 felony, punishable by 1-10 years in prison.²¹ Unlike some other states, Virginia’s decriminalization structure does not have escalating penalties.²² Under this law, each time a person is found in possession of marijuana, it will be a \$25 fine and that fine does not increase with the number of offenses. This fine’s function is more akin to the likes of a traffic ticket than a conviction. It leaves no criminal record and the only report that is generated is to the Department of Motor Vehicles when the defendant has a Commercial Driver’s License (CDL). These changes to the law are expected to ease, but certainly not erase, the racial disparity in marijuana law enforcement in Virginia by reducing the amount of arrests and reducing the total amount of money owed when one is found to be in possession of marijuana.

II. Policy Change in Virginia

Virginia does not make significant policy changes without first conducting a study and decriminalization was no different.²³ In 2017 two bills, SB 908 from Senator Louise Lucas, and SB 1269 from Senator Adam Ebbin, were intended to decriminalize simple possession of small amounts of marijuana.²⁴ Though both of these bills failed, the Senate Courts of Justice Criminal Law Subcommittee did author a letter to the Virginia State Crime Commission (VSCC).²⁵ This letter requested the Crime Commission conduct a study on decriminalization in Virginia.²⁶ There were three possible outcomes to this study: maintaining the current criminalization of cannabis, removing jail time as a punishment for possession, or decriminalization of small amounts of marijuana.²⁷ During the public comment period, a total of 3,850 comments directly related to decriminalization were received by the Commission (others

²⁰ VINCENT VARLET ET AL., DRUG VAPING APPLIED TO CANNABIS: IS “CANNAVAPING” A THERAPEUTIC ALTERNATIVE TO MARIJUANA? 1 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4881394/pdf/srep25599.pdf>; Va. S. 2; Va. H.D. 972.

²¹ See VA. CODE ANN. § 18.2-250 (2020); see also § 54.1-3401 (redefining marijuana so that hashish oil is now covered under the same definition and thus no longer subject to criminal penalties).

²² Ned Oliver, *Marijuana is now decriminalized in Virginia. Here’s what that means*, VA. MERCURY (July 1, 2020), <https://www.virginiamercury.com/2020/07/01/marijuana-is-now-decriminalized-in-virginia-here-what-that-means/>.

²³ See *How a Bill Becomes a Law*, VIRGINIANAVIGATOR (Apr. 8, 2020), <https://virgianavigator.org/article/12489/how-bill-becomes-law>.

²⁴ S. 908, 2017 Gen. Assemb., Reg. Sess. (Va. 2017); S. 1269, 2017 Gen. Assemb., Reg. Sess. (Va. 2017).

²⁵ Va. S. 908; Va. S. 1269.

²⁶ VA. STATE CRIME COMM’N, 2017 ANNUAL REPORT: DECRIMINALIZATION OF POSSESSION OF MARIJUANA 22 (2017), <http://vscc.virginia.gov/2018/2017%20Annual%20Report%20Decriminalization%20of%20Marijuana.pdf>.

²⁷ *Id.* at 22–23.

were related to legalization, medical cannabis, or other topics).²⁸ Of these, 3,743 were in support of decriminalization while 107 were not.²⁹

The Crime Commission report highlighted that Black and Brown Virginians were arrested at much higher rates than white Virginians, despite being a smaller percentage of Virginia's population.³⁰ The study also found that a first-time offender could pay between \$400 and \$800 in costs and fees, depending on the type of probation that is ordered.³¹ When compared to the current \$25 fine, the previous laws now seem arcane and unfair, particularly when it is clear that the laws were disproportionately affecting Black and Brown Virginians. The study delved into the collateral consequences of a marijuana conviction as well.³² It showed that areas such as immigration, employment, housing, firearms purchases, and higher education could all potentially be impacted by a simple marijuana possession conviction.³³ It became clear once the Crime Commission returned the results of their study: Virginia's best option was to decriminalize possession of marijuana. The question remained, what was the best way to do so?

III. Preparing Legislation

Legislation must be introduced by a member of the Senate or the House of Delegates and is often done so at the request of a constituent, organization, or agency.³⁴ The legislator works with stakeholders to outline the bill's primary objectives and then submits a drafting request to the Division of Legislative Services. There, a legislative analyst writes the bill, making the required additions and strikes to the Code of Virginia.³⁵ An initial draft is provided to the legislator for review and collection of stakeholder feedback. Once the final version is agreed upon, the legislator then submits the bill for filing.³⁶ Next, members of the legislature, the administration, organizations, agencies and individuals in support of the legislation can begin whipping support through direct lobbying. The same can be expected of those in opposition to the bill.

²⁸ *Id.* at 25.

²⁹ *Id.*

³⁰ *Id.* at 30.

³¹ VA. STATE CRIME COMM'N, DECRIMINALIZATION OF MARIJUANA 14 (2017), http://vscc.virginia.gov/VSCC_FINAL_Decrim%20Marj%20Present.pdf.

³² *Id.* at 52.

³³ *Id.* at 42.

³⁴ *How a Bill Becomes a Law*, *supra* note 23.

³⁵ *Id.*

³⁶ *Id.*

During the 2020 Virginia General Assembly, decriminalization opposition was offered from organizations that had historically favored such efforts, such as the Virginia chapter of the American Civil Liberties Union of Virginia and Marijuana Justice.³⁷ These groups felt, and continue to feel, that decriminalization did not go far enough to undo the harms of prohibition.³⁸ Of course, they are not incorrect, these measures will not do nearly enough for the people who were affected by the racist and classist systems of enforcement; however, the measures are the starting block with which the Virginia legislature was comfortable.

IV. The Legislative Process

Virginia, like the federal government, has a bicameral legislature. In order for a bill to become a law, it must advance through both the House of Delegates and the Senate.³⁹ However, there are many hurdles a bill must clear before it can even be heard on the floor of either chamber, and many steps after it goes to a vote as well. The general process for all bills is similar. Before the bill ever goes to the floor it must be introduced and then assigned to the appropriate committee. Once it is in committee, the bill is presented and debated, and amendments may be offered.⁴⁰ It is then voted on by the committee and is either passed by indefinitely (fails to advance from committee), reported (succeeds to the next step),⁴¹ or rereferred (sent to another committee).⁴² If a bill successfully reports from committee to the floor of the House or Senate for a vote, it will be read at least three times, debated, amendments may be offered, and a final vote taken.⁴³ If it succeeds in its chamber of origin, the bill then “crosses over” and goes through the same process in the opposite chamber.⁴⁴ Should the bill pass there as well, it is sent to the Governor to be vetoed, amended, or signed into law.⁴⁵

³⁷ Emma Gauthie, *Marijuana reform advocates divided between decriminalization or legalization*, NBC12 (Jan. 16, 2020), <https://www.nbc12.com/2020/01/16/marijuana-reform-advocates-divided-between-decriminalization-or-legalization/>.

³⁸ *See id.*

³⁹ *See* SENATE CLERK’S OFF., SENATE OF VA., YOUR GUIDE TO THE VIRGINIA GENERAL ASSEMBLY, <https://publications.viriniageneralassembly.gov/> (last visited Oct. 2, 2020) (scroll down to “Your Guide to the Virginia General Assembly; then click “Download”).

⁴⁰ *See id.*

⁴¹ *See id.*

⁴² *See How a Bill Becomes a Law: Virginia’s Legislative Process*, OFF. OF STATE GOV’T RELATIONS, UNIV. OF VA., https://sgr.virginia.edu/sites/sgr.virginia.edu/files/leg_process.pdf (last visited Oct. 13, 2020).

⁴³ *See id.*

⁴⁴ *See id.*; *Virginia NORML 2020 General Assembly Update: Crossover*, VA. NORML (Feb. 13, 2020), https://www.vanorml.org/2020_02_13.

⁴⁵ *See How a Bill Becomes a Law: Virginia’s Legislative Process*, *supra* note 42.

Some bills, like the two decriminalization bills, have a more complex process. The basic process is still the same, however, it starts with a patron introducing a bill. In this case it was Senator Adam Ebbin for SB 2 and Delegate Charniele Herring for HB 972.⁴⁶ Once a bill is introduced, additional legislators may then sign on as co-patrons. SB 2 had seven co-patrons: Senators Norment, Morrissey, Boysko, Dunnavant, Lewis, Lucas, and Stanley.⁴⁷ HB 972 had five co-patrons: Delegates Guzman, Helmer, Heretick, Kory and Levine.⁴⁸ Delegate Kory also co-sponsored SB 2 in the House.⁴⁹ Although SB 2 was sponsored by a Democratic senator, it was co-sponsored by several Republicans, highlighting the bipartisan support for decriminalization in the General Assembly.⁵⁰ Once the co-patrons signed on, the bills were assigned to committees by the Senate Clerk and the Speaker of the House. SB 2 was assigned to the Senate Judiciary Committee, while HB 972 was assigned to its House counterpart, the Courts of Justice Committee.⁵¹

In the Senate Judiciary Committee, SB 2 was assigned to the Criminal Law subcommittee where Senator Morrissey's decriminalization bill was incorporated.⁵² This allowed for a consolidation of bills so that the Senate would not be debating several slightly different cannabis decriminalization measures. Rather, they would incorporate this bill and then added some of Senator Morrissey's language to Senator Ebbin's bill.⁵³ From the Criminal Law subcommittee, SB 2 reported to the full Judiciary Committee where it was rereferred to Senate Finance and Appropriations.⁵⁴ There, the Fiscal Impact Statement was reviewed, in which any financial impact to the Commonwealth was determined. SB 2 contains a provision for the sealing of records related to misdemeanor simple possession of marijuana, so a fiscal analysis was required.⁵⁵ Once approved by Finance and Appropriations, the bill reported to the Senate floor for a vote.⁵⁶

The Virginia Constitution requires each bill to be read three times.⁵⁷ The first-time, the title is printed in the agenda; the second time, the patron answers questions, makes amendments that are requested, and, by a voice vote,

⁴⁶ S. 2, 2020 Gen. Assemb., Reg. Sess. (Va. 2020); H.D. 972, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

⁴⁷ Va. S. 2.

⁴⁸ Va. H.D. 972.

⁴⁹ Va. S. 2.

⁵⁰ *See id.*

⁵¹ *Id.*; Va. H.D. 972.

⁵² Va. S. 2.

⁵³ *Marijuana-related legislation in the 2020 Virginia General Assembly, supra note 7. Compare Va. S. 2, with S. 815, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).*

⁵⁴ Va. S. 2.

⁵⁵ Va. S. 2.

⁵⁶ *Id.*

⁵⁷ *See* VA. CONST. art. IV, § 11.

bills are engrossed to carry on to the third reading; at the third reading, a recorded vote takes place.⁵⁸ For SB 2, twenty-seven senators voted to pass the bill and thirteen voted to strike it down.⁵⁹ The bill succeeded and crossed over to the House.

HB 972, in the House Courts of Justice Committee, incorporated bills from Delegates Kory, Heretick, and Levine before reporting out of committee.⁶⁰ Five days later it succeeded the House with 64 delegates voting in favor and 34 delegates voting against the bill.⁶¹ HB 972 crossed over into the Senate.

At that point, SB 2 proposed a \$50 fine for possession of up to one ounce of marijuana with juvenile offenses being treated with a Child in Need of Services (ChINS) petition.⁶² HB 972 proposed a \$25 fine for possession of up to one half ounce of marijuana, with juvenile offenses being treated as a delinquency.⁶³ It is common for companion bills to have small differences that are reconciled later in the process.

After crossing over, the bills don't have to go through incorporations, but they are questioned just as vigorously in the committees. In the House, SB 2 went through the House Courts of Justice and to the Committee on Appropriations to assess the records sealing provision again.⁶⁴ After reporting out of committee to the House floor for a vote, SB 2 passed the House 63 to 35.⁶⁵ In the Senate, HB 972 was referred to the Senate Judiciary committee and then to Finance and Appropriations as a records sealing provision had been added to the bill. After reporting out of committee, HB 972 passed the Senate with 27 senators in support and 13 senators against.⁶⁶ As both bills had succeeded in both chambers of the legislature and had minor differences that needed to be reconciled, they were assigned to a conference committee.⁶⁷ Each chamber assigned three people to represent its interests in the bills and to propose amendments.⁶⁸

At the conference committee, those assigned took several days to reach a consensus. The conference was requested on February 26, 2020 and the

⁵⁸ *See id.*

⁵⁹ Va. S. 2.

⁶⁰ *See* H.D. 972, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (presenting the substitute proposed by the House Committee for Courts of Justice).

⁶¹ *Virginia NORML 2020 General Assembly Update: Crossover, supra* note 44.

⁶² Va. S. 2.

⁶³ *See Virginia NORML 2020 General Assembly Update: Crossover, supra* note 44.

⁶⁴ *See* Va. S. 2.

⁶⁵ *See id.*

⁶⁶ H.D. 972, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

⁶⁷ *Virginia NORML 2020 General Assembly Update: Crossover, supra* note 44.

⁶⁸ *See* Va. H.D. 972; *see also* Va. S. 2.

report was not printed until March 5, 2020.⁶⁹ With such a complex piece of legislation and such a big policy step, it is no surprise that legislators took their time to make sure the law was as agreeable as possible for the many stakeholders. After this first conference, both chambers were required to accept or reject the conference report. The House accepted the conference report, however the Senate rejected it by a wide majority (2-38).⁷⁰ A second conference was agreed to and conducted, this time lasting only a day.⁷¹

Eventually, they settled on a \$25 fine for personal possession of up to one ounce of marijuana, with juvenile offenses being treated as delinquency.⁷² While these measures are not perfect, and they leave many Virginians out of the criminal justice reform that they propose, they still mark an enormous step forward. Once this second conference report was agreed to and the bills were reconciled, they were sent to Governor Ralph Northam when the session adjourned. Northam also proposed several Amendments to be voted on during the constitutionally mandated “Reconvene Day.”⁷³

The Virginia Constitution requires legislators to reconvene in April to consider recommendations by the Governor.⁷⁴ Some were agreed to and others were rejected.⁷⁵ Governor Northam wished to strike the appeals process as well as amend the sunset clause of the attached legalization study from November of 2020 to November of 2021. Both of those amendments were rejected by both chambers.⁷⁶ After being sent back to the Governor, both bills were signed and the last bill that was signed, SB 2, contains the prevailing code.⁷⁷

⁶⁹ See Va. S. 2.

⁷⁰ See Va. H.D. 972.

⁷¹ See *id.*; Va. S. 2.

⁷² See *Virginia Laws and Penalties*, *supra* note 10; *Virginia NORML 2020 General Assembly Update: Crossover*, *supra* note 44.

⁷³ Governor’s Recommendation, H.D. 972, 2020 Sess. (Va. 2020), <https://lis.virginia.gov/cgi-bin/legp604.exe?201+amd+HB972AG>.

⁷⁴ See VA. CONST. art. IV, § 6 (“The General Assembly shall reconvene on the sixth Wednesday after adjournment of each regular . . . session for the purpose of considering bills which may have been returned by the Governor with recommendations . . .”).

⁷⁵ Compare Enrolled Bill Text, H.D. 972 2020 Sess. (Va. 2020), <https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+HB972ER> and Governor’s Recommendation, Va. H.D. 972, with Reenrolled Bill Text, H.D. 972, 2020 Sess. (Va. 2020), <https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+HB972ER2>.

⁷⁶ Compare Enrolled Bill Text, H.D. 972, 2020 Sess. (Va. 2020), <https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+HB972ER> and Governor’s Recommendation, H.D. 972, 2020 Sess. (Va. 2020), <https://lis.virginia.gov/cgi-bin/legp604.exe?201+amd+HB972AG>, with Reenrolled Bill Text, H.D. 972, 2020 Sess. (Va. 2020), <https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+HB972ER2>.

⁷⁷ See S. 1286, 2020 Gen Assemb., Reg. Sess. (Va. 2020) (amending VA. CODE ANN. § 19.2-389.3 (2020)).

V. Engaging the Public

Virginia NORML and other organizations used many methods to help the public engage with their elected representatives. Email campaigns were created to allow people with a few easy clicks to input their information to send a prewritten email to their representatives.⁷⁸ Members of the public were encouraged to call, email, and make appointments to discuss these issues with their legislators in order to build support.⁷⁹ Virginia NORML organizes annual lobby days, with the 2020 lobby day being focused on the goal of supporting decriminalization.⁸⁰ Through the years, many campaigns have been run to encourage lawmakers to end cannabis prohibition. Many long-standing organizations maintain web pages dedicated solely to contacting state lawmakers in favor of ending prohibition.⁸¹

As public support for ending prohibition has grown, businesses have started allying with reform organizations in support as well. O'Connor Brewing Company in Norfolk, Virginia has partnered with Virginia NORML in the past for events promoting cannabis legalization.⁸² The 2020 General Assembly was quite different as the final stretch, when in-person support events and celebratory events would have been seen popping up across the commonwealth, COVID-19 was just beginning to shut the state down.

In addition to businesses, city leaders and Commonwealth's Attorneys are also joining the fight.⁸³ Some Commonwealth's Attorneys decided to dismiss misdemeanor marijuana cases before the decriminalization measures passed, such as Portsmouth Commonwealth's Attorney Stephanie Morales⁸⁴ and Norfolk Commonwealth's Attorney Greg Underwood.⁸⁵

⁷⁸ *Virginia NORML 2020 General Assembly Update: Crossover*, *supra* note 44.

⁷⁹ *See id.*

⁸⁰ *Cannabis Comes to the Commonwealth*, VA. 2020 CANNABIS CONF. & LOBBY DAY, <https://conference-vanorml.nationbuilder.com/> (last visited Oct. 4, 2020).

⁸¹ *See, e.g., Virginia: Urge your lawmakers to end cannabis prohibition!*, MARIJUANA POL'Y PROJECT, <https://www.mpp.org/takeaction/actions/virginia-urge-your-lawmakers-to-end-cannabis-prohibition/> (last visited Sept. 29, 2020); *Overview of the Marijuana Policy Project*, MARIJUANA POL'Y PROJECT, <https://www.mpp.org/about/overview-of-the-marijuana-policy-project/> (last visited Oct. 14, 2020).

⁸² *See Legalize Virginia Festival Returns to O'Connor Brewing Co on 4/20*, VA. NORML, https://www.vanorml.org/2019_04_09 (last visited Sept. 29, 2020).

⁸³ *Charlottesville City Leaders Agree: It's Time for Decriminalization in Virginia*, VA. NORML (Apr. 26, 2019), https://www.vanorml.org/2019_04_26 (noting the Charlottesville Chief of Police, Commonwealth's Attorney and two City Councilors agree that it is time to decriminalize marijuana); *Charlottesville Commonwealth's Attorney Platania to Appear at Marijuana Policy Town Hall at CitySpace*, VA. NORML (Apr. 23, 2019), https://www.vanorml.org/2019_04_23.

⁸⁴ Scott Daugherty, *Portsmouth prosecutor will move to dismiss most misdemeanor marijuana charges*, THE VIRGINIAN-PILOT (Apr. 11, 2019), https://www.pilotonline.com/news/crime/article_0eba50f2-5c9d-11e9-94db-63ebb21a8d59.html.

⁸⁵ Jonathan Edwards, *Norfolk's top prosecutor says he's taking fight over pot cases to state Supreme*

Social media plays a very large role in engaging the public. Reminders to call, email, write letters to local lawmakers could be found all over social media; both in support of and in opposition to the bills.⁸⁶ Social media along with direct media coverage has been pivotal in changing not only public opinion, but also opinions within the legislature. In the 2018 session, Senator Norment voted against decriminalization and expungement.⁸⁷ In the 2020 session he co-sponsored SB 2 and sponsored an expungement bill for marijuana possession offenses.⁸⁸

VI. Changing the Landscape

These bills will drastically change the landscape of cannabis policy reform in Virginia. Activists have been fighting for decades and are only just now scratching the surface of what is possible.⁸⁹ Marijuana decriminalization will not end racial profiling in policing, nor will it end racial disparities in marijuana-related infractions in Virginia. However, it will decrease arrests by about fifty percent, which is around 15,000 fewer arrests per year.⁹⁰ Those arrested for marijuana possession are mostly black and brown Virginians who are drastically overrepresented in the state's overall arrest data and the prison population, despite being underrepresented in the total population.⁹¹ While marijuana decriminalization alone cannot fix this disparity, it will provide a sort of temporary stopgap for many people. Ultimately, the ideal resolution would lead to zero criminal penalties for responsible use by adults, allow for the implementation of a regulatory model for safe retail distribution, and would not lead to criminalization for juveniles but rather a plan that provides necessary services without law enforcement intervention.

Court, DAILY PRESS (Mar. 4, 2019), <https://www.dailypress.com/news/crime/dp-nws-norfolk-pot-supreme-court-20190304-story.html>.

⁸⁶ Virginia NORML, FACEBOOK (Feb. 19, 2020), <https://www.facebook.com/vanorml/posts/10157211752603510>; ACLU of Virginia (@ACLUVA), TWITTER (Feb. 18, 2020), <https://twitter.com/ACLUVA/status/1229795570950266880?s=20>.

⁸⁷ *Marijuana-related Legislation in the 2020 Virginia General Assembly*, *supra* note 7.

⁸⁸ S. 2, 2020 Gen. Assemb., Reg. Sess. (Va. 2020); S. 608, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (proposing changes to expungement statutes).

⁸⁹ See e.g., Norman Leahy, *Virginia, just legalize marijuana already*, WASH. POST (Sept. 2, 2020), <https://www.washingtonpost.com/opinions/2020/09/02/virginia-just-legalize-marijuana-already/> (noting that the Virginia Legislative Black Caucus is prioritizing the legalization of marijuana during the General Assembly special session).

⁹⁰ See Allison Bazzie, *ACLU of Virginia opposes bills to decriminalize marijuana, wants legalization*, 13NEWS NOW (Feb. 6, 2020), <https://www.13newsnow.com/article/news/politics/aclu-of-virginia-opposes-bills-to-decriminalize-marijuana-wants-legalization/291-7ce5c4c8-321d-4582-b0ae-96eaeaf-bdd82>; Caleb Stewart, *A roundup of new Virginia laws taking effect at the start of July*, WHSV3 (June 26, 2020), <https://www.wHSV.com/2020/06/26/a-roundup-of-new-virginia-laws-taking-effect-at-the-start-of-july/>.

⁹¹ VA. STATE CRIME COMM'N, *supra* note 26, at 30.

The necessary votes, however, were not available for a legalization measure to succeed during the 2020 Virginia General Assembly.⁹² To facilitate support, a JLARC study has been planned and is in progress for the 2021 session.⁹³ This steppingstone approach is not uncommon. Many states that started by decriminalizing eventually legalized cannabis.⁹⁴ According to the National Organization for the Reform of Marijuana Laws, out of the 26 states that have decriminalized cannabis, ten have gone on to legalize possession as well.⁹⁵ With the study provision included in the new law, it is likely that Virginia will become the eleventh.

VII. Additional Considerations

The decriminalization law includes a “ban the box” provision. This forbids employers from inquiring about arrests, criminal charges, or convictions related to simple marijuana possession.⁹⁶ This is likely to allow many qualified workers to rejoin the workforce. The new law also requires Virginia State Police to seal records related to misdemeanor simple marijuana possession. While this also comes with some limitation (it only covers simple possession and is still available to the DMV for any person holding a commercial driver’s license), it will also allow many people to gain employment and housing they were unable to have before the passage of this law.⁹⁷ However, the records that are being sealed are the records in the Central Criminal Records Exchange which are mostly accessed by law enforcement, while civil infractions are filed at the courthouse and with the local law enforcement.⁹⁸ Third parties often aggregate this data and sell it to background check

⁹² David Dominique, *Dominion, Decriminalization, and Demilitarizing the Police: An Exclusive Q&A with Jennifer McClellan*, RVA MAG. (Aug. 6, 2020), <https://rvamag.com/politics/virginia-politics/dominion-decriminalization-and-demilitarizing-the-police-an-exclusive-qa-with-jennifer-mcclellan.html>; see, e.g., H.D. 87, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (serving as an example of legislation aimed at legalizing marijuana that was continued to 2021 in the House Courts of Justice Committee).

⁹³ Dominique, *supra* note 92.

⁹⁴ *Decriminalization*, NORML, <https://norml.org/laws/decriminalization/> (last visited Oct. 9, 2020) (identifying states that decriminalized marijuana before subsequently legalizing possession).

⁹⁵ *Id.*

⁹⁶ Tyler S. Laughinghouse & Ryan A. Glasgow, *Virginia Enacts “Ban the Box” Legislation for Marijuana Possession Arrests, Charges, and Convictions*, NAT’L L. REV. (June 10, 2020), <https://www.natlawreview.com/article/virginia-enacts-ban-box-legislation-marijuana-possession-arrests-charges-and>.

⁹⁷ See Brian Solomon, *Virginia moves toward marijuana decriminalization*, ASSOCIATED PRESS (Feb. 10, 2020), <https://www.whsv.com/content/news/Virginia-moves-toward-marijuana-decriminalization-567732241.html> (quoting Del. Herring’s discussion of marijuana criminal records and the negative impact they have on people’s efforts to find housing and employment); see also S. 2, 2020 Gen. Assemb., Reconvened Sess. (Va. 2020) (prohibiting employers from using certain information about marijuana convictions); but see VA. CODE ANN. § 18.2-250.1(B) (2020).

⁹⁸ See *Marijuana Possession is a Civil Infraction in Virginia – Can I Smoke Now?*, SUROVELL ISAACS & LEVY PLC: BLOG, <https://surovellfirm.com/criminal-law/marijuana-possession-is-a-civil-infraction-in-virginia-can-i-smoke-now/> (last visited Oct. 3, 2020).

companies which will cause a discrepancy in what a person tells their employer and what shows up on a background check.⁹⁹ In order to solve this issue, it is necessary to fully expunge such records and disallow the dissemination of such by private entities. Expungement would allow those with simple possession charges to have those charges wiped from their records as if they had not happened. There would be no need to disclose as they would not appear on background checks. Even with these limitations, decriminalization will provide a safety net for thousands of Virginians that was not there before. By decreasing the amount paid from between \$400 and \$800 to \$25, many more Virginians will be kept out of court and kept out of jail for simply not being able to pay the fines.

The law also fails to address paraphernalia, or items used to sell, prepare, inhale, or ingest drugs.¹⁰⁰ Typically, in this context, paraphernalia is considered to be water pipes, hand pipes, rolling papers, grinders, and scales.¹⁰¹ Under Virginia law, possession of paraphernalia is a class 1 misdemeanor.¹⁰² It is very common for prosecutors to allow defendants to plead from possession of marijuana to a paraphernalia charge.¹⁰³ However, the intent of the legislature was not for paraphernalia charges to take the place of misdemeanor marijuana possession. The failure to address this issue is an oversight by the legislature and shows a lack of understanding. Had the legislators voting on these laws truly understood the basic tenets behind repairing the harms of prohibition, decriminalizing the use and possession of paraphernalia would have been included in such bills.

CONCLUSION

Virginia marijuana law has come a long way since the initial passage of prohibition. Even Republican senators who voted down similar proposals just two years ago have come to support reform.¹⁰⁴ Cannabis policy reform has

⁹⁹ *See id.*

¹⁰⁰ *See* § 18.2-250.1.

¹⁰¹ VA. CODE ANN. § 18.2-265.1 (2020).

¹⁰² *Id.* at § 18.2-265.3.

¹⁰³ *What is Possession of Marijuana Drug Paraphernalia in VA*, FIRST POINT L. GROUP PC (Oct. 7, 2019), <https://www.firstpointlawva.com/blog/2019/10/what-is-possession-of-marijuana-drug-paraphernalia-in-va>.

¹⁰⁴ *Compare* Patrick Wilson, *Virginia Senate Republicans kill bill to decriminalize small amounts of marijuana*, RICH. TIMES-DISPATCH (Jan. 29, 2018), https://richmond.com/news/local/government-politics/virginia-senate-republicans-kill-bill-to-decriminalize-small-amounts-of-marijuana/article_93739abe-14ba-5cdb-a291-bd9f22f03957.html (noting that Senate Republicans voted to kill a bill that would decriminalize small amounts of marijuana), *with* Jackie DeFusco, *Decriminalizing marijuana has bipartisan support in Virginia*, 8NEWS (Feb. 5, 2020), <https://www.wric.com/news/politics/capitol-connection/decriminalizing-marijuana-has-bipartisan-support-in-virginia/> (noting bipartisan support to decriminalize the possession of marijuana just two years later).

become a bipartisan issue for legislators and residents alike. With a majority of Virginians in favor of legalization,¹⁰⁵ more and more legislators are coming to terms with the idea of a new Virginia. These two decriminalization bills endured a tough process to become a law. It may not be the victory that Virginians were hoping for, but it is the best step Virginia could take in 2020, and it is a critical steppingstone on the path to legalization. The law has a provision for a study and a workgroup that are already underway with a report due in November of this year.¹⁰⁶ Not only is this a sign that times are changing, it is a sign they are changing quickly.

By bringing these bills to the table, incorporating other bills, and consolidating efforts, Virginia put forth its best effort in cannabis law reform this year. While that best effort was not the ideal for many people, it is what could garner enough votes in the 2020 General Assembly to succeed, and what legislators were able to pass in order to protect as many Virginians as they could. The idea of reducing the harms of prohibition has gone through years of studies, years of being voted down in committees, and thousands of discussions with policy experts.¹⁰⁷ By rejecting proposals from the Governor to lengthen the timeline of the study and remove the possibility of appeals, it shows that the legislature is in fact ready for the possibility of legalization and more robust criminal justice reform than the Governor. It is likely that even as early as 2021, Virginia will see even more progressive reforms in marijuana policy.

There is no denying that this legislation has its problems. This law is a piece of tape holding together a house that is falling apart. However, this law is a much-needed safety net for so many Virginians whose lives have been upended by the failed policy of prohibition. The reduction in arrests will hopefully prevent so many of the problems that this law is struggling to fix. If a person is not arrested, it is the hope of the legislature that the person will not lose their home and their employment. If there is no record created, there will be no record to seal or expunge. The attempts were made to repair the racist and classist divisions within the Virginia carceral system, despite

¹⁰⁵ *Virginians Favor Legalizing Marijuana by Wide Margin, UMW Poll Shows*, UNIV. OF MARY WASH. (Sept. 20, 2019), <https://www.umw.edu/news/2019/09/20/virginians-favor-legalizing-marijuana-by-wide-margin-umw-poll-shows/>.

¹⁰⁶ S. 2, 2020 Gen. Assemb., Reg. Sess. (Va. 2020); Dominique, *supra* note 92 (noting the forthcoming JLARC study on how to legalize distribution equitably).

¹⁰⁷ See, e.g., Brian Reese, *Weed legalization, decriminalization bills for Virginia die in committee*, 10 WAVY (Jan. 17, 2019), <https://www.wavy.com/news/weed-legalization-decriminalization-bills-for-virginia-die-in-committee/> (discussing two Virginia decriminalization bills that previously died in committee). See generally KATHERINE BECKETT & STEVE HERBERT, *THE COST OF MARIJUANA PROHIBITION* 55–59 (2008), <https://lsj.washington.edu/research/publications/katherine-beckett-and-steve-herbert-2008-consequences-and-costs-marijuana> (serving as an example of prior research on the harms associated with marijuana prohibition and referencing a host of other studies dedicated to discerning its negative effects).

efforts to keep these systems and structures in place. So, while this legislation may have issues, and while it does not cover everything, it is a start and one that was unimaginable just two years ago.